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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 775

WILMINGTON TRUST COMPANY, EXECUTOR OF ALICE DUPONT ORTIZ, DECEASED,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Wilmington Trust Company, Executor of Alice duPont Ortiz, Deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the case entitled, "Guy T. Helvering, Commissioner of Internal Revenue, petitioner, v. Wilmington Trust Company, Executor of Alice duPont Ortiz, Deceased, and Julian Ortiz, Husband

of Deceased, Respondents," on September 3, 1941, reversing the decision of the United States Board of Tax Appeals.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 1-23) is reported in 42 B. T. A. 173. The opinion of the Circuit Court of Appeals (R. 87-94) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 3, 1941 (R. 94). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the amounts charged as dividends to a taxpayer's short account with a broker may for income tax purposes be offset against amounts credited as dividends to the taxpayer's long accounts. The determination of this question depends upon the preliminary determination of the two following questions:

(a) Whether the sales in the taxpayer's so-called short account were in fact "short" sales.

(b) Whether, if the sales in the so-called short account are considered to be "short" sales, the amounts charged as dividends to that account were ordinary and necessary expenses of a business within the meaning of Section 23 (a) of the Revenue Act of 1934.

2. Whether commissions paid on sales of securities and commodities under the circumstances of this case constitute ordinary and necessary expenses of a business under Section 23 (a) of the Revenue Act of 1934.

Statute Involved.

Revenue Act of 1934, c. 277, sec. 23 (a), 48 Stat. 688.

"DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Statement.

The taxpayer* is a resident of Greenville, Delaware, and filed joint income tax return with her husband for the years 1934 and 1935, which were made on the cash receipts and disbursements basis (R. 2).

Alice duPont Ortiz, hereinafter referred to as the taxpayer, from 1925 to October 1, 1932, maintained three brokerage accounts with Laird, Bissell & Meeds at their Wilmington, Delaware, office. These accounts were designated, "Alice duPont Ortiz," "Alice duPont Ortiz, Special," and "Alice duPont Ortiz, Short," which are hereinafter referred to, respectively, as the regular, special, and

* After the decision of the Board of Tax Appeals and prior to the filing of the petition for review, Alice duPont Ortiz died and after Suggestion of Death by the petitioner, her executor was ordered to appear and to designate counsel. On May 24, 1941, Wilmington Trust Company appeared as executor, with certain reservations, and designated counsel.

short accounts. The brokerage firm of Laird & Company was organized on October 1, 1932, with offices at Wilmington, and as of that date the taxpayer transferred the three accounts to Laird & Company, who restated them on their books in the same manner, and in the same amounts, as they stood on the books of Laird, Bissell & Meeds. Thereafter, the taxpayer opened three additional accounts with Laird & Company designated, respectively, as "trading," "commodity," and "spot" accounts. All of these accounts were carried with Laird & Company during the taxable years. On October 18, 1932, the taxpayer notified Laird & Company in writing that the regular, special and short accounts were one and the same and were merely kept separate for her convenience and that she was the only person who had any interest therein. This notice was later amended to include the trading account (R. 3).

When the regular, special, and short accounts were transferred to Laird & Company, the position of those shares having a long and those having a short status, as set up on the books of Laird & Company as of October 1, 1932, were as follows (R. 4):

	Longs Shares	*Shorts Shares*	*Net Shares*
duPont deNemours & Co.	37,000	9,100	27,900
McKeesport Tin Plate Co.	15,050	8,850	6,200
American Ice Co.	2,500	300	2,200
Baltimore & Ohio R. R. Co.	900	500	400
Continental Diamond Fibre Co.	3,100	3,000	100

The net number of shares, as indicated above,* were received by Laird & Company and their correspondent New York brokers from Laird, Bissell, & Meeds for the account of the taxpayer (R. 5).

From time to time during the period October 1, 1932, to December 31, 1935, the taxpayer directed Laird & Company to sell in her short account stocks of various corporations

* The fact that only the net number of shares were transferred was specifically stipulated (R. 30).

where at the same time like shares of stock were held in her regular and special accounts. Upon receipt of instructions to sell stocks in the taxpayer's short account, where at the same time like shares were held in her regular and special accounts, Laird & Company transmitted the order by telephone to their New York correspondent broker with instructions to make the sale in the regular way on the floor of the New York Stock Exchange, that is, for delivery on the full business day following the contract. Delivery was made to the purchasing broker by Laird & Company through their New York correspondent with shares of stock in street names held for the account of Laird & Company by their New York correspondent, and the latter thereupon credited the account of Laird & Company with the proceeds of the sale of the stock and reduced the number of shares of the particular stock held in street names for Laird & Company by the number of shares sold. Laird & Company thereupon credited the taxpayer's short account with the proceeds of the sale, and also allowed interest on the account. None of the shares of like stock shown as in long positions in the taxpayer's regular and special accounts were registered in her name. They were in the form of street certificates, none of which were in any way designated as belonging to the taxpayer (R. 5).

During the years 1934 and 1935, the taxpayer's regular and special accounts were credited and her short account was charged with amounts designated as dividends, on the respective dividend dates, as follows (R. 6):

Year 1934

Date	*Security*	*Shares, long account*	*Shares, short account*	*Credited as Dividends*	*Charged as Dividends*
3/15/34	duPont	39,356	39,356	$19,678.00	$19,678.00
6/15/34	do	39,356	39,356	25,581.40	25,581.40
9/15/34	do	39,356	39,356	45,259.40	45,259.40
12/15/34	do	39,356	39,756	31,484.80	31,804.80
				$122,003.60	$122,323.60

Year 1934—Continued

Date	*Security*	*Shares, long account*	*Shares, short account*	*Credited as Dividends*	*Charged as Dividends*
1/2/34	McKees, T. P.	6,650	6,650	6,317.50	6,317.50
4/2/34	do	6,650	6,650	6,650.00	6,650.00
7/2/34	do	6,650	6,650	6,650.00	6,650.00
				19,617.50	19,617.50
2/15/34	Phillips Pet	5,000	4,800	1,250.00	1,200.00
5/14/34	do	5,000	4,800	1,250.00	1,200.00
9/4/34	do	5,000	4,800	1,250.00	1,200.00
				3,750.00	3,600.00
1/2/34	Eq. Of. Bldg.	1,100	200	261.25	47.50
4/2/34	do	1,100	200	275.00	50.00
7/2/34	do	1,100	200	110.00	20.00
				646.25	117.50
9/12/34	Gen. Motors		200		150.00
12/12/34	do		300		75.00
9/15/34	Calif. Packing		200		75.00
	Total			146,017.35	145,958.60

Year 1935

3/15/35	duPont	5,100	4,700	3,315.00	3,055.00
6/15/35	do	5,100	5,200	3,315.00	3,380.00
9/14/35	do	5,100	5,100	6,375.00	6,375.00
12/13/35	do	5,100	5,100	4,590.00	4,500.00
12/27/35	Gen. Mts. div.	92-40/55	90-50/55	5,227.50	5,125.00
				22,822.50	22,435.00
3/29/35	Con'l Dia. Fibre...	2,000	2,000	300.00	300.00
6/28/35	do ...	2,000	2,000	300.00	300.00
9/30/35	do ...	2,000	2,000	500.00	500.00
				1,100.00	1,100.00
3/12/35	Gen. Motors		300		75.00
7/15/35	Amer. Tel. & Tel...		400		900.00
10/15/35	do ..		275		618.75
	Total			23,922.50	25,128.75

In the case of sales made through the short account, none of the sales tickets bore the words "short sale" nor did they contain any direction not to deliver any of the taxpayer's stock. Pursuant to the authority granted to treat all the accounts as a unit, Laird & Company, in all

cases where the taxpayer held in her long accounts shares in excess of those being sold through the short account, did not require any margin and made delivery out of the long accounts against the sale made through the short account, crediting the taxpayer with the cash proceeds of the sale. At the time of the sale the delivery of the shares was recorded on the short account and the position in the long account was reduced by the number of shares sold (R. 7).

In those cases where the long accounts did not contain shares in excess of the number sold through the short account, Laird & Company charged the taxpayer the regular marginal requirement for a short sale, borrowed the stock for the purpose of delivery, and charged the taxpayer with the Federal short sale tax. The proceeds of the sale were carried as a credit in her account until such time as she delivered the stock. It was what is known as a fictitious credit, since the cash was retained by Laird & Company for the protection of the purchaser or the broker from whom the stock was borrowed (R. 7).

The amounts credited by Laird & Company as dividends on the regular and special accounts during 1934 and 1935 were reported by them to the Treasury Department on Form 1087 as dividends received on stocks owned by the taxpayer. While Laird & Company credited the full amount of dividends on shares in the long accounts and charged the amount of dividends on shares in the short account, they actually received directly or through their correspondents dividends on the net amount of shares held by them, and the cash dividends received and held for the taxpayer were those on the number of shares in the long account in excess of the number in her short account (R. 7-8).

On October 3, 1934, a journal entry was made on the books of Laird & Company as of September 10, 1934, and posted in the taxpayer's accounts, showing delivery of 6,650 shares of McKeesport Tin Plate Company from the

taxpayer's special account, and the receipt of 6,650 shares of that stock in the taxpayer's short account. Laird & Company did not have physical possession of any McKeesport Tin Plate Company stock on October 3, 1934. The shares of McKeesport Tin Plate Company stock held for customers were being held by the New York correspondent brokers of Laird & Company. The accounts of such correspondent brokers and the number of shares held by them were not affected in any manner by the said journal entry. The total number of shares of McKeesport Tin Plate Company stock held by such correspondent brokers were held for customers of Laird & Company who did not have a short position with the latter and the said shares were in safekeeping (R. 8).

In the income tax returns for 1934 and 1935, the taxpayer did not report any of the dividends credited to her long accounts. The Commissioner, in determining the deficiencies, held that the sales made through the short account were short sales, and that the dividends charged to the short account represented additional cost of stock purchased to cover the short sales and could not be offset against the dividends credited to the long accounts or deducted as interest or as an ordinary and necessary business expense. He accordingly increased the dividend income of the taxpayer by the amounts of $146,008.60 for 1934, and $23,922.50 for 1935 (R. 8).

The taxpayer was a housewife and had income from certain trusts and other sources. During the period 1925 to 1935, she purchased and sold securities and commodities through her brokerage accounts with Laird, Bissell & Meeds and Laird & Company, and had no other business activity. She received 39,000 shares of duPont stock in 1931 which were later placed in her accounts with Laird, Bissell & Meeds. During 1932 to 1935, she regularly and continuously purchased and sold securities in large volume. The

securities dealt in varied in kind and many transactions were handled in the course of a single day. Many of the purchases were in lots of from 100 to 500 shares. During 1932 she purchased over 148,000 and sold over 190,000 shares at a total cost and selling price of over $6,000,000. During 1933 the volume of purchases declined to 35,000 shares at a total cost of over $1,200,000, and the volume of sales declined to 66,000 shares at a total selling price of $1,900,000. The total number of shares purchased and sold during the taxable years, and the cost and selling prices, were as follows (R. 9):

Year	Shares purchased	Shares sold	Cost	Selling price
1934	15,510	18,125	$ 622,331.08	$ 568,700.25
1935	25,175	27,925	1,216,829.52	1,247,113.06

In addition the taxpayer purchased and sold some commodities in 1935. The taxpayer paid commissions on the sales made in the amount of $2,378.75 during 1934, and $4,827.25 during 1935 (R. 9).

The taxpayer entered into these transactions for the purpose of profit. She was not a member of a brokerage firm and did not subscribe to stock market or stock ticker services. She informed herself of market conditions through market reports and periodicals and relied principally for advice upon R. W. Ellis, and after his death upon George Weymouth and Russell Jones. Ellis and Weymouth were experienced brokers. The taxpayer visited the brokerage offices and consulted Ellis at her home and over the telephone. These consultations took place regularly, and Ellis was at the taxpayer's home on business matters almost every day. After his death the taxpayer took a more active part in the direction of purchases and sales made through Weymouth. However, in minor transactions he acted without first consulting her. Ellis kept the taxpayer's books at his office. They contained accounts reflecting the taxpayer's

holdings and dealings in stocks and bonds, and her receipts from interest and dividends. After his death the accounts were transferred to the taxpayer's home, where they were kept by Jones. Jones was employed by her as secretary and spent a part of each day at her home keeping records and conferring with her on market transactions. The taxpayer maintained an office at her home, where she kept such records and held conferences with Ellis, Weymouth, and Jones. Ellis and Weymouth usually determined the account through which any particular transaction was handled. The taxpayer devoted approximately an hour a day, on the average, to her stock market activities. Taxpayer was regularly engaged in the business of buying and selling securities and commodities (R. 9-11).

The Commissioner of Internal Revenue assessed deficiencies in income tax for the years 1934 and 1935. The case involves, however, only the income and deductions for those two years of Alice duPont Ortiz. On August 30, 1940, the Board of Tax Appeals entered its decision (R. 24) holding that the so-called "short" sales were actually executed as ordinary sales, or sales of shares held in the taxpayer's long accounts, and that the dividends on the long stock should be offset by the dividends charged to the taxpayer on her short account; that the taxpayer was engaged in the business of buying and selling securities and, therefore, the commissions paid to brokers on sales of stock and commodities constituted ordinary necessary business expenses.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In reversing the Board of Tax Appeals' findings that the sales from the "short" account of Alice duPont Ortiz were not in fact short sales, when there was substantial evidence in the record to sustain the Board's findings.

2. In the alternative to (1) above, in reversing the Board of Tax Appeals' finding that Alice duPont Ortiz was engaged in the business of buying and selling securities for profit, when there was substantial evidence in the record to sustain the Board's finding.

3. In holding that commissions paid on sales of securities and commodities under the circumstances of this case were not ordinary and necessary expenses of a business under Section 23 (a) of the Revenue Act of 1934.

Reasons for Granting the Writ.

I.

The Circuit Court of Appeals' decision that the sales in question were short sales was arrived at in disregard of decisions of this Court determining the function of the Circuit Court when reviewing a decision of the Board of Tax Appeals.

(A.)

In the case of *Helvering* v. *Kehoe*, 309 U. S. 277 (1940), this Court announced the following principle:

> "Under the rule often announced, the function of the Board of Tax Appeals is to weigh the evidence and determine the result as to matters properly before it. *Upon review the Court may not substitute its judgment of the facts for that of the Board.* When there is substantial evidence to support the conclusion of the matter, this must be accepted." (Italics ours.)

See also:

Helvering v. *Rankin*, 295 U. S. 123, 131;
General Utilities Co. v. *Helvering*, 296 U. S. 200, 206;
Elmhurst Cemetery Co. v. *Commissioner*, 300 U. S. 37, 40.

The Board of Tax Appeals found that the sales from the taxpayer's so-called "short" account were in fact not "short" sales. This finding of fact the Circuit Court did not accept, but proceeded to undertake a review of the evidence in order to determine its own findings of fact. Thus reviewing the evidence the Circuit Court eventually arrived at the finding that the sales in question were in fact "short" sales. It will no doubt be urged that the conclusion that the sales were "short" sales was not, on the part of the Circuit Court, a substitution of its judgment for that of the Tax Board, but was merely a conclusion of law from facts found by the Board. That such an argument is erroneous is patent when the opinion of the Circuit Court and the findings of the Board are compared.

Thus, in support of its position the Circuit Court states:

> "Quite clearly taxpayer treated the sales as short sales. The transactions were so entered upon the books. Gains or losses were not reported at the moment of sales, as would be done if a long sale were contemplated. Instead the profit or loss entry was not made until the covering transaction was completed. The certificates of stock actually used were in no way designated as belonging to taxpayer. * * * the money was withheld for no reason other than such a practice is consistent with a short sale" (R. 88).

The facts there stated are directly contrary to the facts as found by the Board of Tax Appeals. The Board finds as a fact:

> "Pursuant to the authority granted to treat all accounts as a unit, Laird & Co. in all cases where the petitioner held in her long accounts shares in excess of those being sold through the short account,* did not

* The only sales involved are those through the short account, when there was an excess of the same stock in the long accounts. Admittedly there were other true "short" sales, not involved in this case.

require any margin and made delivery out of the long accounts against the sale made through the short account, crediting the petitioner (taxpayer) with the cash proceeds of the sale. At the time of the sale the delivery of the shares was recorded on the short account and the position in the long accounts was reduced by the number of shares sold" (R. 7).

In view of these two statements an irreconcilable conflict exists between the views of the Tax Board and the Circuit Court *on the basic facts of this case.*

It is quite evident that the Circuit Court did not permit the Board to be the arbiter of the facts. This is aptly illustrated by the next succeeding paragraph to the one above quoted from the Circuit Court's opinion. That paragraph is a discussion of the evidence before the board upon which, the Circuit Court states, the board relied in arriving at its findings of fact. The Circuit Court then proceeds to evaluate the testimony of two *witnesses,* and to conclude that the board should not have relied upon their testimony in determining the facts.* Thus the Circuit Court concludes that "it cannot be said that the broker did not use borrowed stock to make deliveries on short sales." This reaches the very crux of the question of whether the sales in question were short sales, or long sales. Admittedly if the stock sold was not borrowed to cover the sales, then in fact the sales were not short sales. Let us see what the board found to be the fact.

"Laird & Co., in all cases where the petitioner held in her long accounts shares in excess of those being sold through the short account, did not require any margin and made delivery out of the long accounts against the sale made through the short account, crediting the peti-

* In doing so the court ignored the fact that the Board of Tax Appeals had before it a stipulation of the parties, which covered a major portion of the facts.

> tioner (taxpayer) with the cash proceeds of the sale" (R. 7).

It is, therefore, quite apparent that the Board *found as a fact* that the stock thus sold was in fact stock held by Mrs. Ortiz in her long accounts; a finding of basic fact rejected by the Circuit Court.

The conclusion of the Circuit Court as to what the facts were concerning the sales in controversy, is the same as the facts surrounding admittedly true short sales made by the taxpayer. The Circuit Court takes the position that with respect to both types the facts were the same. This conclusion is, however, not supported by the record.

In the case of a true short sale made by the taxpayer, Laird & Co. charged the taxpayer the regular marginal requirement for a short sale, borrowed stock for the purpose of delivery, and charged the taxpayer with the Federal short sale tax (R. 7). In none of the sales herein involved were these facts present (R. 7).

The Circuit Court makes much of the fact that the certificates of stock actually delivered were in no way designated as belonging to taxpayer (R. 88). The facts as determined by the board are that deliveries were made from the long accounts of taxpayer (R. 7, 14). As to the stock held in those accounts the board found:

> "None of the shares of like stock shown as in long positions in the petitioner's regular and special accounts were registered in her name. They were in the form of street certificates, none of which were in any way designated as belonging to the petitioner" (R. 5).

It is urged that the foregoing adequately shows that the Circuit Court refused to follow the findings of the Board of Tax Appeals that the sales in controversy were not in fact short sales.

The fact is, therefore, that the Circuit Court did not apply itself to determine whether or not there was in the record evidence of a substantial nature to support the finding of the Board of Tax Appeals that the sales in question were not short sales, but ignored its function in that respect and busied itself with examining the record to determine for itself what the facts were. In doing this the court ignored those facts, established by substantial evidence, which supported the Board's findings, but which facts did not fit into the court's own conception of things. This, as often said by this Court, was not its function on appeal from the Board. The Circuit Court in effect has said that in this case it will determine the facts, irrespective of the unanimous findings of the entire Board of Tax Appeals.

(B.)

The Circuit Court refused to accept the Board's holding that taxpayer was carrying on a trade or business and so entitled to a deduction for income tax purposes for all ordinary and necessary expenses paid or incurred. The Circuit Court recites some of the facts upon which the Board rested its finding. The list, however, is not complete; absent is the very important fact that taxpayer entered into the various transactions for the purpose of profit. (R. 89)

The Circuit Court rests its conclusion upon the definition of doing business contained in Mr. Justice Frankfurter's concurring opinion in *Deputy* v. *duPont*, 308 U. S. 488, 499. This, however, is not the test as laid down by the Supreme Court, but is rather the expression of the opinion of an individual Justice. The rule heretofore applied by the court as a whole is that applied in *Dart* v. *Commissioner*, 74 F. (2d) 845, which was cited with approval in the majority opinion of the *Deputy* case at page 495. The facts in the *Dart* case were almost identical with those in the in-

stant case, and in the *Dart* case the taxpayer was held to be carrying on a trade or business, because he was a trader in securities for profit, as was Mrs. Ortiz.

The Circuit Court has refused to follow the heretofore established definitions of what constitutes doing business and has adopted a new concept of what that is, on the strength of the expression of the views of a single Justice in a case which the majority of the court thought did not involve that question. (308 U. S. at page 493) The result is confusion upon the subject, since the Circuit Court has engrafted upon the earlier concept of what constitutes doing business an additional element, viz., the holding of oneself out to others as engaged in the selling of goods and services. This is a failure to adhere to the decisions of this Court.

In a later case, *Higgins* v. *Commissioner*, 312 U. S. 212, this Court again had occasion to determine the question of what constituted doing business. While in that case the decision was that the taxpayer was not doing business, still the case is a reiteration of the position taken heretofore. It is significant that Mr. Justice Reed, who concurred in the concurring opinion in the *Deputy* case relied on by the Circuit Court did not apply the definition set forth in that opinion, a definition which, if applied, would have been determinative of the case. In view of this, it is suggested that the Circuit Court's assumption that the definition to be applied is that announced in the concurring opinion in the *Deputy* case was, to say the least, premature.

It is pertinent to quote here from *Higgins* v. *Commissioner, supra.*

> "To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case. As the Circuit Court of Appeals observed, all expenses of every business transaction are not deductible. Only those are deductible

which relate to carrying on a business. The Bureau of Internal Revenue has this duty of determining what is carrying on a business, subject to reexamination of the facts by the Board of Tax Appeals and ultimately to review on the law by the courts on which jurisdiction is conferred. The Commissioner and the Board appraised the evidence here as insufficient to establish petitioner's activities as those of carrying on a business. The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, *such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board.* Its conclusion is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section." (Italics ours)

Nothing could be clearer than this. It is a definite statement that the question of whether or not a taxpayer is doing business is a question of fact *to be determined* by the Board of Tax Appeals, whose finding is final, if it can be supported by the record. Whatever that decision may be, it is not reviewable on appeal. The decision of the Circuit Court in the instant case is an inexplicable variance from the settled rule.

II.

The Circuit Court's decision that the sales in question were "short" sales was arrived at in disregard of decisions of this Court that in tax cases it must determine tax liability on the basis of reality, and must look through form to substance.

This Court in *United States* v. *Tex-Pen Oil Co.*, 300 U. S. 481 (1937) said:

"* * * the rule is well settled that in determining tax liability, taxing authorities must look through form to fact and substance."

In *Davidson* v. *Commissioner*, 305 U. S. 44 (1938), this Court said:

> "The Commissioner rightly computed gain on the basis of what was done rather than on what petitioner intended to do."

To the same effect is *United States* v. *Phellis*, 257 U. S. 156 (1921).

The Board of Tax Appeals held that the separation of taxpayer's accounts into long and short accounts was a mere bookkeeping device, and thus not determinative of the question of whether the sales were short sales or long sales. (R. 13-16) The Board then found as a fact that actually the sales in question were long sales (R. 16). In reaching this conclusion the Board followed the rules laid down by the cases cited above. The Circuit Court, however, on appeal, held that the separation of the accounts into long and short accounts was decisive of the question and reversed the finding of the Board. In so doing, the Circuit Court ignored the decisions of this Court, referred to *supra*, in that it looked not to fact and substance, but permitted itself to be blinded by the *form* of the matter. That this is so may be aptly illustrated by referring to the taxpayer's transactions in McKeesport Tin Plate stock.

At the time taxpayer's accounts were transferred to Laird & Company, the so-called "long" account showed 15,050 shares of McKeesport, and the "short" account showed a short position of 8,850 shares. Laird & Company actually received only 6,200 shares (R. 29-30). The written instructions of the taxpayer to the broker were that all of her accounts should be treated as one and the same (R. 75). Laird & Company thereupon treated her accounts as "long" 6,200 shares, considering only her net position in that security (R. 45-48).

During the years 1932 and 1933 taxpayer bought and sold various amounts of McKeesport Tin Plate with the result that on January 1, 1934, she had a "long" balance of 6,650 shares of that stock, and at the same time a "short" balance of 6,650 shares, one account thus completely offsetting the other (R. 31).

On October 3, 1934, as of September 10, 1934, a journal entry was made on the records of Laird & Company washing out the purported "long" and "short" positions (R. 31, 47). The Circuit Court held that such a journal entry indicated physical delivery of the stock, yet this holding is unsound when the situation is analyzed.

In 1934 Laird & Company did not have any McKeesport Tin Plate stock which could have been delivered on October 3 or on September 10, or on any other date during that year, nor did Laird & Company at any time from January 1 to October 3, 1934, have 6,650 shares of McKeesport (R. 32). In fact, the only McKeesport stock held by Laird & Company during that period at no time exceeded 3,725 shares, which was being held in safekeeping for other customers and could not have been used by Laird & Company for any purpose whatsoever (R. 32).

The "Special" account of taxpayer shows a credit of 6,650 shares of McKeesport for the period January 1, 1934, to September 30, 1934, while the "Short" account of taxpayer for the corresponding period shows a debit of 6,650 shares of McKeesport. These accounts show no transactions in that stock during that period (R. 31, 32).

During the period January 1 to October 3, 1934, the records of Laird & Company show that the "Special" account was credited with three dividends on 6,650 shares of McKeesport totaling $19,617.50, while on the same dates her "Short" account was charged with the same amounts, totaling $19,617.50 (R. 31). Taxpayer made identical entries in her own books (R. 10).

The record discloses that Laird & Company, during this period, did not receive or claim any dividends on McKeesport Tin Plate; taxpayer's accounts were debited and credited with the above stated dividends, but the entries were made simply for bookkeeping purposes; no income was actually received by taxpayer on McKeesport stock after her so-called long and short positions in that stock had reached a balance (R. 62-64).

The foregoing shows that taxpayer in fact received no taxable income from any dividends on McKeesport Tin Plate stock after the sales in her short account had equalled the number of shares in her long account. This is the fact of the transaction, which fact is adequately supported by the record. It shows that the entries in the books were as a matter of fact a mere bookkeeping device. The Board of Tax Appeals correctly went through the *form* of the transaction and determined what the *fact and substance* of it was. The Circuit Court did not do this, it stopped with the form and did not penetrate to the substance.

What has been above demonstrated with respect to McKeesport Tin Plate can be demonstrated with respect to each of the securities which are the subject of this case.

For the reasons above set forth, it is respectfully submitted that this petition should be granted.

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